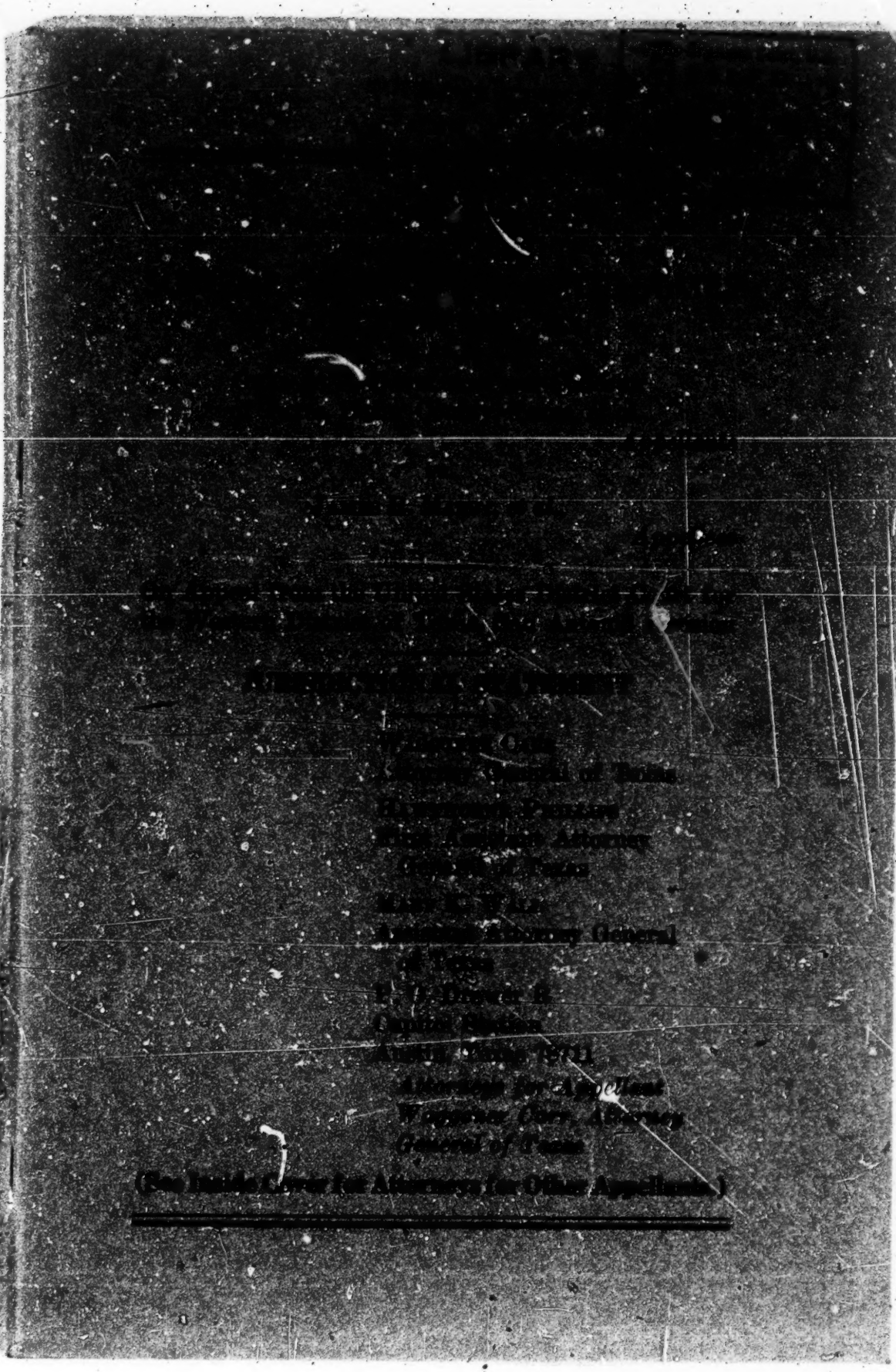

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

CHARLES G. DAVIS, Assessor-Collector of Taxes, Bexar County, Texas, *et al.*,

Appellants

vs.

JAMES R. MABRY, *et al.*,

Appellees

On Appeal from the United States District Court for the Western District of Texas, San Antonio Division

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JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Western District of Texas, San Antonio Division, sitting as a three-Judge Court, holding unconstitutional under the Fourteenth Amendment the provisions in the Constitution and the Election Code of the State of Texas which provide that members of the Armed Forces may vote only in the county of their residence at the time of entering service.

Opinion Below

The opinion of the District Court is reported at 232 F. Supp. 930. The opinion and judgment are set out as Appendix I of this Jurisdictional Statement.

Jurisdiction

In their complaint Plaintiffs alleged, among other grounds of constitutional infirmity, that the Texas law deprives them of the equal protection guaranteed by the Fourteenth Amendment to the Constitution of the United States, and invoked the jurisdiction of the District Court under various federal statutes, including 28 U.S.C. § 1343, as an action to redress the deprivation of rights, privileges and immunities secured by the Constitution of the United States, and 28 U.S.C. § 1357, as an action to enforce the right of a citizen of the United States to vote in the State of Texas. The District Court held that it had jurisdiction under Section 1 of the Fourteenth Amendment and 28 U.S.C. §§ 1343 and 1357.

The suit was brought as a class action, pursuant to Rule 23(a)(3), F.R.C.P.

Plaintiffs asked for injunctive relief restraining defendants from acting under the terms of the state law to deprive plaintiffs of their right to vote, and a three-Judge Court was convened to hear the case, as required by 28 U.S.C. §§ 2281 and 2284.

On August 26, 1964, the Court entered judgment holding that the provisions of the Texas law under attack violate the Equal Protection Clause of the Fourteenth Amendment "insofar as they wholly deny the right to vote in Texas to members of the armed forces residing in this State who entered military service from other States." By the judgment each of the defendants was enjoined from acting "in any way to deprive either of the plaintiffs, or anyone else entering military service as a resident of another State who otherwise in

good faith meets all of the requirements of a qualified elector in Texas, of the right to vote in this State."

On October 22, 1964, the defendants filed with the clerk of the District Court their Notice of Appeal to the Supreme Court of the United States. Jurisdiction of this appeal is conferred on the Supreme Court by 28 U.S.C. § 1253, which reads:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

State Laws Involved in the Case

The following provision in Article 6, Section 2 of the Constitution of the State of Texas is under attack:

> "Any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces."

The only official publication of this section, as last amended, is in Texas Session Laws, 54th Legislature, Regular Session, 1955, at page XLI. It appears as an unofficial publication in Vernon's Texas Statutes, 1956 Supplement, at page XX, and in Vernon's Annotated Texas Constitution, volume 2, at page 339.

The statutory counterpart of this constitutional provision, contained in Section 34 of the Texas Election Code, reads as follows:

"Notwithstanding any other provision of this section, any member of the Armed Forces of the United States or component branches thereof who is on active duty in the military service of the United States may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces. This restriction applies only to members of the Armed Forces who are on active duty, and the phrase 'time of entering such service' means the time of commencing the current active duty. A re-enlistment after a temporary separation from service upon termination of a prior enlistment shall not be construed to be the commencement of a new period of service, and in such case the county in which the person resided at the time of commencing active service under the prior enlistment shall be construed to be the county of residence at at the time of entering service."

This statute is unofficially codified in the editions of Texas statutes published by the Vernon Law Book Company as Article 5.02 of the Election Code. There is no current official compilation of Texas statutes. The Vernon publications are the ones in general use, and the Vernon numbering has been used in the pleadings, briefs, and opinion in the District Court. The statute is published officially in the Texas Session Laws, 58th Legislature, Regular Session, 1963, at page 1031. It appears at page 377 of Vernon's Texas Statutes, 1964 Supplement, and at page 18 of the 1963 Cumulative Annual Pocket Part to Volume 9 of Vernon's Annotated Revised Civil Statutes of Texas.

The full text of Article 6, Section 2 of the Texas Constitution and of Article 5.02 of the Texas Election Code appear as Appendix II of this Jurisdictional Statement.

Questions Presented by the Appeal

The following questions are presented by this appeal:

1. Whether the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States applies to state action prescribing qualifications and conditions for voting in state elections.

2. If the Equal Protection Clause does apply to such action, whether the provisions in Article 6, Section 2 of the Constitution of Texas, and Article 5.02, Vernon's Annotated Texas Statutes Election Code, which limit voting by persons in military service to the county of their residence at the time of entering service, is an unreasonable classification in violation thereof.

3. If the provisions under attack violate the Fourteenth Amendment, whether the State could lawfully prescribe more stringent conditions under which the right of suffrage may be exercised by persons in military service than by voters generally, such as requiring them to furnish more detailed information in applying for registration, or to supply evidence or make affidavits with respect to facts supporting their claim of residence, which are not required of voters generally. Could the conditions go to substantive qualifications, such as a longer period of residence, or ownership of a homestead at the place of residence? Could persons who have established residence during military service be permitted to vote in elections not local in character but excluded from voting on local offices and issues (e.g., elections held by a county, a city, a school district)?

4. Whether the class of persons which plaintiffs represent in this case includes persons in military serv-

ice who are not "similarly situated" because they have not resided for as great a length of time or do not own property at the place of claimed residence, or cannot show an intent to continue to make that place their home throughout military service and afterward, or are differently situated in other respects.

5. If the provisions under attack are invalid as applied to plaintiffs and others similarly situated, but the State could impose more stringent conditions such as longer length of residence or ownership of property at the place of claimed residence, whether the District Court was correct in declaring the provisions invalid as to *all* persons entering service as residents of other States who otherwise meet the requirements of a qualified elector in Texas.

6. Whether the provisions under attack, if invalid as applied to persons who entered military service as residents of other States, are also invalid as applied to persons who entered service as residents of Texas.

Statement of the Case

This suit was brought by James R. Mabry, a Staff Sergeant in the United States Air Force, and David M. Sneary, a First Lieutenant in the Air Force, on behalf of themselves and of all other persons in the armed forces of the United States in all parts of the State of Texas who are similarly situated because of their being in the military service. Defendants are Charles G. Davis, Tax Assessor-Collector of Bexar County, Texas, Waggoner Carr, Attorney General of the State of Texas, Calvin Galm, election judge for the election precinct of Bexar County in which one of the plaintiffs resides, and Mrs. Eugene Irvin, election

judge for the election precinct of Bexar County in which the other plaintiff resides. For persons of the plaintiffs' age, the obtaining of a poll tax receipt or an exemption certificate is a condition precedent to voting in the State of Texas. It is the duty of the County Tax Assessor-Collector to issue poll tax receipts and exemption certificates and to make up the list of qualified voters for the county from the duplicate receipts and certificates retained in his office.

Sergeant Mabry, who is now 27 years old, is a career airman. He has been in military service since 1955 and was a resident of the State of Wisconsin at the time of his original enlistment. He has been stationed in San Antonio, Bexar County, Texas, since May, 1959, having been assigned there pursuant to his request, upon being given a choice of station after completing a tour of duty in Iceland. He has claimed San Antonio as his place of legal residence since that date. He is married, and his family lives with him in a home which they own there. He intends to reside permanently in San Antonio. If he were transferred elsewhere, his family would remain in San Antonio, and he would return there when he retired from service, if not reassigned to duty in San Antonio sooner.

Lieutenant Sneary is also 27 years old and is a career Air Force officer. He was commissioned in June, 1960, at which time he was a resident of the State of Oklahoma. He has been stationed at Kelly Air Force Base, in San Antonio, Bexar County, Texas, since June, 1962, having been assigned there pursuant to his choice of duty stations in the United States, and has claimed legal residence there since that date. Other pertinent

facts in his case are essentially the same as those listed above for Sergeant Mabry.

It is undisputed that under the laws of the State of Texas both plaintiffs are legal residents of Bexar County and are subject to all the obligations and possessed of all the rights and privileges of legal residents of the State except the privilege of voting. It is also undisputed that both plaintiffs meet all other qualifications for voting in Bexar County during the voting year 1964 except that they do not meet the condition imposed by Article 6, Section 2 of the Texas Constitution, stating that persons in military service may vote only in the county in which they resided at the time of entering service. Because of their failure to meet this condition, the Tax Assessor-Collector of Bexar County refused to place their names on the list of qualified voters for the year 1964. Alleging that they were being deprived of a right to vote in violation of the Federal Constitution, they brought this suit asking for judgment declaring the Texas law unconstitutional and for injunctive relief against the defendants. On August 26, 1964, the District Court entered judgment declaring the laws to be in violation of the Equal Protection Clause of the Fourteenth Amendment, and enjoining the defendants from acting in any way to deprive plaintiffs of the right to vote in Bexar County.

Substantiality of the Questions

The facts as well as the basic legal question of constitutionality of the Texas law are essentially the same in this case as in *Carrington v. Rash,* No. 82, October Term 1964, now pending for full consideration by this Court following the granting of a petition for writ of certiorari to the Supreme Court of Texas from a judg-

ment holding the law to be valid. Respondent's brief on the merits in *Carrington* was mailed to the Clerk for filing on December 11, 1964. Respondent (the Attorney General of Texas) has not been notified of the setting of a date for hearing.

Question No. 1 and Question No. 2. These questions go to the correctness of the holding that the Texas law violates the Fourteenth Amendment. Question No. 2 is identical in substance with the question presented by Petitioner in *Carrington;* and in his answer to Petitioner's brief in that case the Respondent has raised the first question presented by this appeal. In view of the granting of the writ in *Carrington,* no argument is necessary to support the substantiality of these two questions.

Since the Court's action in *Carrington* will answer the first two questions, full consideration by this Court of the case under appeal would not be deemed necessary if these were the only questions presented by the appeal. However, there are additional questions not raised in *Carrington,* which will become material if the judgment of the Supreme Court of Texas in *Carrington* is reversed and that of the District Court in the instant case is affirmed. These questions have not previously been answered by this Court and should be answered if the judgment of the District Court is affirmed. They are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Question No. 3. This question is whether the State may lawfully prescribe more stringent conditions under which the right of suffrage may be exercised by persons in military service than by voters generally.

The District Court has indicated an affirmative answer to this question, in the following statements in the opinion:

> "We disagree with that holding of the majority of the Court in that case,[1] and agree with the minority that the attempt of the state to segregate *all* persons in miliary service as a class to be treated differently from other persons in regard to the right to vote, 'is arbitrary and unreasonable, thereby violating the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.' 378 S.W.2d, at 309." (Emphasis by the Court.) Appendix I, p. 23, *infra.*
>
> "But even if the present laws are not adequate to protect against the hazard of a military take-over at the polls, there is nothing to prevent the state from setting up more stringent conditions under which the right of suffrage may be exercised, so long as they are reasonable and do not discriminate between individuals. The vice in the amendment is that it constitutes a *complete* abrogation of the right of plaintiffs to vote in Texas under *any* circumstances while they are in the military service." (Emphasis by the Court.) Appendix I, p. 30, *infra.*

Appellants agree with the District Court that the State should be able to impose more stringent conditions, because they believe that there are substantial difference between the military and the civilian which justify treating the classes differently. That is the very basis on which they contend that the present restriction in the Texas law is valid. But if the Court holds the present restriction to be invalid, the power of the State to impose more stringent conditions on military

[1]The reference is to the holding by the Supreme Court of Texas in *Carrington v. Rash* that the Texas law is valid.

voters is immediately put into question as being a denial of equal protection, since the holding would amount to a judicial determination that there did not exist differentiating characteristics to justify the classification.

Question No. 4 and Question No. 5. These questions go to the scope of the District Court's judgment, and of the judgment to be entered by this Court if the District Court's holding on the first three questions is sustained.

The District Court has declared the Texas law to be invalid "insofar as it *wholly* denies the right to vote in Texas to members of the armed forces residing in this State who entered military service from other states." (Emphasis supplied.) Appellants interpret this portion of the judgment as declaring the law invalid as to certain persons or circumstances, but not as to all persons in military service who might be able to claim legal residence in the State and who, if claiming residence, would meet the qualifications of an elector.

In the light of the District Court's opinion, Appellants agree with the action of the Court in not declaring the law wholly void. If the State may validly impose more stringent conditions under which the right of suffrage may be exercised by persons in military service than by voters generally, the law should not be declared wholly void, and should be left to operate within the sphere of the State's power. However, the portion of the judgment granting an injunction is inconsistent with the declaratory portion, and is too broad, in that it enjoins the defendants from acting to

prevent *any* serviceman who entered service as a resident of another State from voting in Texas elections if he otherwise meets all the requirements of a qualified elector. The injunction operates in favor of those whom the Court has said the State may exclude as well as those whom it may not exclude.

If the holding on the first two questions is affirmed, a resolution of the third, fourth and fifth questions is of immediate importance in determining the exact scope of the judgment which this Court should enter —whether the Texas law is to be declared wholly void and stripped of all vitality, or whether it is to be declared only partially void and left to function in those areas encompassed within the State's power.

Resolution of the third and fifth questions will also be needed to provide guidelines as to the extent and the limits of the State's power in the formulation of any future legislation which it might wish to undertake.

Question No. 6. The invalidity declared by the District Court is as to members of the armed forces who entered military service from other States, and the injunction operates in favor of "anyone * * * entering military service as a resident of another State." However, the restriction in the Texas law operates upon persons who entered service as residents of Texas as well as upon those who entered as residents of other States. The sixth question is whether the law, if invalid as to persons entering service from other States, is also invalid as to persons entering from Texas. Its answer will be important in the framing of any future legislation.

Conclusion

Appellants ask the Court to defer action on this appeal until it has rendered its decision in *Carrington v. Rash,* No. 82, October Term, 1964, now pending on the docket of the Court. If the judgment in that case is affirmed, Appellants ask the Court to reverse the judgment of the District Court in this case on authority of that case. If the judgment in *Carrington v. Rash* is reversed, Appellants ask the Court to accept jurisdiction of this case for full consideration of the additional questions presented by this appeal, including the reception of briefs and oral argument.

Respectfully submitted,

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PROOF OF SERVICE

I, MARY K. WALL, one of the attorneys for Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 18th day of December, 1964, I served a copy of the foregoing Jurisdictional Statement on MR. ARTHUR M. GOCHMAN, Attorney for Appellees, by mailing a copy in a duly addressed envelope, with first class postage prepaid, addressed to him at 906 Maverick Building, San Antonio, Texas.

MARY K. WALL

APPENDIX I

A. Judgment of the District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JAMES R. MABRY, DAVID M. SNEARY ET AL., Plaintiffs v. CHARLES G. DAVIS, Assessor-Collector of Taxes, Bexar County, Texas; WAGGONER CARR, Attorney General of Texas; and CALVIN GALM and MRS. EUGENE IRVIN, Election Judges for Precincts 86 and 135, respectively, Bexar County, Texas, for the 1964 General Election; Defendants.	Civil Action No. 3395 JUDGMENT

On the 13th day of July, 1964, came on to be heard before this Three-Judge Court designated to hear and determine this action, the petition for injunction and other relief filed by the plaintiffs on behalf of themselves, individually, and those similarly situated; and the Court having fully considered the pleadings, evidence, stipulations, briefs and arguments of counsel, is of the opinion and so finds that this judgment should be entered.

Accordingly, it is ordered as follows:

(1) That Article 6, Section 2, of the Constitution of Texas, and Article 5.02, Vernon's Annotated

Texas Statutes Election Code, insofar as they wholly deny the right to vote in Texas to members of the armed forces residing in this State who entered military service from other states, constitute an unreasonable classification, and therefore violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

(2) That each of the defendants is hereby restrained and enjoined from acting in his or her official capacity or otherwise under the terms of said provisions of the Constitution and Statutes of Texas in any way to deprive either of the plaintiffs, or anyone else entering military service as a resident of another State who otherwise in good faith meets all of the requirements of a qualified elector in Texas, of the right to vote in this State.

(3) All costs incurred in connection herewith shall be adjudged against the defendants, but no execution therefor shall issue.

Entered at San Antonio, Texas, this 26th day of August, 1964.

JOHN R. BROWN
United States Circuit Judge

ADRIAN A. SPEARS
United States District Judge

HOMER THORNBERRY
United States District Judge

B. Opinion of the District Court

[Heading Omitted]

Before BROWN, Circuit Judge, and SPEARS and THORNBERRY, District Judges.

SPEARS, District Judge:

The question in this case is whether or not Article 6, Section 2, of the Constitution of Texas, and Article 5.02, Vernon's Annotated Texas Statutes Election Code, insofar as they wholly deny the right to vote in Texas to members of the armed forces residing in this state who enter military service from other states, violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. We hold that they do.

This suit is brought as a class action in behalf of plaintiffs and others in the State of Texas "who are similarly situated because of their being members of the armed forces of the United States or component branches thereof, or in the military service of the United States."

In general, the plaintiffs claim that they, as individuals, and the class they represent, are deprived of their right to vote in Texas solely because they are members of the armed forces; that they are otherwise fully qualified to vote in every way; and that the Constitution and statute of Texas which prevent them from voting are in derogation of Article 1, Sections 2 & 4 of the Federal Constitution, as well as Sections 1 and 2 of the Fourteenth Amendment to that Constitution. They ask for judgment declaring the Texas laws unconstitutional, and for injunctive relief against the defendants, in consequence of which this three-judge Court was designated pursuant to Title 28 U.S.C., Section 2281.

Defendants contend that the Court does not have jurisdiction of this controversy, but that, in any event,

the Constitution and laws of Texas relating to the classification of electors do not violate any provision of the United States Constitution.

The facts are undisputed.

Plaintiff, James R. Mabry, a 27 year old Staff Sergeant in the United States Air Force, resides at 910 Mount Kisco, in Precinct 135, San Antonio, Bexar County, Texas. He came to San Antonio in May, 1959. On September 16, 1963, he was discharged from the Air Force in that city, and he was there when he reenlisted in the Air Force on the following day.

In August, 1960, Sergeant Mabry and his wife moved into a home at 415 Merry Ann, San Antonio, which they then owned. They remained in it as their homestead, paid taxes thereon, slept and had all their belongings there until May, 1963, when they moved into their present home, which they own as their homestead, pay taxes on, and in which they sleep at night and keep all their belongings. At no time since May, 1959, has Sergeant Mabry maintained a residence other than in San Antonio, Bexar County, Texas.

Although Sergeant Mabry entered the armed forces from the State of Wisconsin, he has never voted nor made any attempt to vote in that state. He is not a resident of Wisconsin and has no intention of declaring it as his residence. On the contrary, he has been stationed in San Antonio by his preference, and intends to permanently reside there.

In view of Sergeant Mabry's training in research work he has been frozen at his present station, but stated that: "If the freeze is lifted and I am trans-

ferred someplace else, I would probably not take steps to resign from the service but would obey the orders given me. I would travel alone. My family would still stay at my present address and I would return to Texas either when I got out of the service (or) when I returned. I would make every effort to come back to the job I now hold, and since I am familiar with it, I know from (the) experience of other individuals that this is very possible. In fact, it is almost assured that I could come back to the same job because they do need trained research workers."

Plaintiff, David M. Sneary, a 26 year old First Lieutenant in the United States Air Force, resides at 2222 Rawhide, in Precinct 86, San Antonio, Bexar County, Texas. He came to San Antonio in May, 1962, at which time he was, and still is, a member of the armed forces.

Upon his arrival in San Antonio, Lieutenant Sneary moved into a house with his wife at 5518 Plumtree, where they remained until June, 1963, when they moved into their present address, which they own as their homestead, pay taxes on, and where they sleep at night and keep all their belongings. At no time since May, 1962, has Lieutenant Sneary maintained a residence other than in San Antonio, Bexar County, Texas.

Lieutenant Sneary entered the armed forces from the State of Oklahoma, but is not a resident of that state and has no intention of declaring it as his residence. He is in San Antonio at his own request, and intends to permanently reside there. He does say, however, that: "If I received orders transferring me to another state I would obey the orders and not make an effort to get out of the service. If the orders are

of a nature to remain here or go overseas, I would more than likely remain here, but if I am flatly ordered to an overseas base, I would leave my family here and go alone and then return after the assignment."

Defendant, Charles G. Davis, is the Assessor-Collector of Taxes of Bexar County, Texas, and is charged with the duty of collecting poll taxes and issuing receipts therefor; defendant, Waggoner Carr, is Attorney General of the State of Texas, in which capacity he has sought to uphold the provisions of Article 6, Section 2 of the Texas Constitution, and the Election Code of the State of Texas; and defendants, Calvin Galm and Mrs. Eugene Irvin, are the Election Judges for Precincts 86 and 135, respectively, Bexar County, Texas, for the 1964 General Election.

Plaintiffs fulfill all the qualifications of persons required to pay a poll tax and entitled thereto.[1] They are native-born citizens of the United States, have established their residences in the State of Texas, and their occupation is that of members of the armed forces. Payment of a poll tax is a qualification for voting under the laws of the State of Texas.[2]

In the year 1964, the defendant Assessor-Collector issued poll tax receipts to Dorothy Mabry, wife of James R. Mabry, and to Clara L. Sneary, wife of David M. Sneary. On January 23, 1964, he issued to James R. Mabry 1964 Poll Tax Receipt No. 14041, upon payment by him of a poll tax for 1963, but wrote thereon, "Not Eligible To Vote." On January 24, 1964, he is-

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[1]Vernon's Ann. Tex. St. Election Code, art. 5.09; Vernon's Ann. Tex. St. Tax—Gen., art. 2.01.

[2]Vernon's Ann. Tex. Const. art. 6, § 2; Vernon's Ann. Tex. St. Election Code, art. 5.02.

sued to David M. Sneary 1964 Poll Tax Receipt No. 140402, upon payment by him of a poll tax for 1963, but wrote thereon, "Not Entitled To Vote." He refused to place plaintiffs, or any person of the class they represent, on the list of persons entitled to vote, which list he is required to make under the laws of the State of Texas,[3] and instructed his employees that unless persons in the military service can state they entered the service from Bexar County, they were not to collect or accept payment for a poll tax from them. The poll tax payments made by the named plaintiffs, and the poll tax receipts they received in payment of the 1963 tax, were executed by agreement of the parties.

It is agreed that both plaintiffs are residents of San Antonio, Bexar County, Texas, under the provisions of the Texas Election Code,[4] and that it is solely by virtue of the operation of the Constitutional provision and the implementing Statute[5] that they are unable to vote in Texas.

This Court has jurisdiction of this controversy, because the complaint herein plainly sets forth a case arising under Section 1 of the Fourteenth Amendment to the Constitution of the United Sates.[6] Since we are convinced that the provisions of the Texas Consitution

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[3]Vernon's Ann. Tex. St. Election Code, art. 5.22.

[4]"'The 'residence' of a single man is where he usually sleeps at night; that of a married man is where his wife resides, or if he be permanently separated from his wife, his residence is where he sleeps at night; * * *." Vernon's Ann. Tex. St. Election Code, art. 5.08.

[5]Vernon's Ann. Tex. Const. art. 6, § 2; Vernon's Ann. Tex. St. Election Code, art. 5.02.

[6]28 U.S.C.A. §§ 1343 and 1357; Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L.ed. 2d 663 (1962); U.S.C.A. Const. Amend. 14 § 1.

and the implementing statute involved, insofar as they totally deny the right to vote in Texas to plainiffs and those similarly situated, violate the equal protection clause of the Fourteenth Amendment, our discussion will be limited to the consideration of them in the light of that Amendment to the Federal Constitution.

Section 1 of the Fourteenth Amendment provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any citizen of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S.C.A. Const. Amend. 14 § 1.

Article 6, Section 2, of the Constitution of Texas, as amended in 1954, reads as follows:

> "Any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces." Vernon's Ann. Tex. Const. art. 6, § 2.

It is interesting to note that the amendment to the Texas Constitution makes no mention of the serviceman's wife, so her right to vote is not affected thereby, one way or the other.

In the very similar case of *Carrington v. Rash*, 378 S.W. 2d 304 (April 29, 1964), the Supreme Court of Texas recently held that the purpose of the amendment was "to prevent a person entering military service as a resident citizen of a county in Texas from acquiring a different voting residence in Texas during the period

of his military service, and to prevent a person entering military service as a resident citizen of another state from acquiring a voting residence in Texas during the period of military service." 378 S.W. 2d, at 305. We, of course, accept this construction of the amendment by the highest Court of the state. That very able Court, however, by a majority of seven to two was also of the opinion that denying to military personnel "the right of suffrage in the place where they may be stationed—while in no sense denying the exercise of such right in their place of original residence—is not unreasonable and the classification established is nondiscriminatory," 378 S.W. 2d, at 306, and then concluded that a resident of another state upon entering the military service does not possess "a 'federally protected right' to vote in Texas elections while in the military service in whatever county or district in Texas to which he may elect to change his voting residence." 378 S.W. 2d, at 307.

We disagree with that holding of the majority of the Court in that case, and agree with the minority that the attempt of the state to segregate *all* persons in military service as a class to be treated differently from other persons in regard to the right to vote, "is arbitrary and unreasonable, thereby violating the equal protection clause of the Fourteenth Amendment of the Constitution of the United States." 378 S.W. 2d, at 309. After recognizing that "the Federal Constitution, or any of its amendments, does not give to a person the privilege to vote in any state," citing *Minor v. Happersett,* 21 Wall. 162,22 L. ed. 627, Associate Justice Clyde E. Smith, in his dissenting opinion, con-

curred in by Chief Justive Robert W. Calvert, and using language which we approve and adopt, said:

"* * * It is clear that the privilege to vote in a state is within the jurisdiction of the state itself, 'to be exercised as the state may direct * * *.' Pope v. Williams, 193 U.S. 621, 24 S. Ct. 573, 48 L. ed. 817 (1904). In fact, the Federal Constitution makes voters' qualifications rest on state law even in federal elections. Art. 1, Sec. 2. However, in exercising its broad powers to determine the conditions under which the right of suffrage may be exercised, the state cannot impose standards which the United States Constitution condemns as discriminatory. See Lassiter v. Northampton County Board of Elections, 360 U.S. 45, 79 S. Ct. 985, 3 L. ed. 2d 1072.

"It is elementary that 'class legislation' is invalid where the classification is arbitrary and unreasonable. The classification must rest on real and substantial differences and must reasonably promote some proper object of public welfare or interest. Thus, without contravening any restriction that Congress has imposed, a state can determine that only those persons who are literate should vote since '(t)he ability to read and write * * * has *some relation* to standards designed to promote intelligent use of the ballot.' Lassiter v. Northampton County Board of Elections, supra.

"In the present case Respondents contend that the purpose of the Constitutional amendment in question is to prevent a concentration of military voting strength in areas where military bases are located because such concentration might lead to complete domination and control of local politics by military men to the prejudice of the civilian citizens of the community. In my opinion this is not a reasonable ground upon which the State can say that there exists a real and substantial differ-

ence between servicemen and other citizens, and thereby confer different voting rights on these classes.

"With present day mobility and industrialization, large groups, *other than servicemen,* move into the various communities of this state for limited stays, and establish voting residence. One need only look to the large shifts of civilian population to major construction areas as an illustration of this fact.

"Wherein lies the reasonable basis for distinguishing between these groups?

"In the recent case of Gray v. Sanders, 372 U.S. 368, 83 S. Ct. 801, 9 L. ed. 2d 821 (1963), our Supreme Court has said:

> '* * * there is no indication in the Constitution that homesite or *occupation* affords a permissible basis for distinguishing between qualified voters within a state. * * * (Emphasis added.)
>
> '* * * Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, *whatever their occupation,* whatever their income, and wherever their home may be in that geographical unit. This is required by the equal protection clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those *who meet the basic qualifications.* * * *' (Emphasis added.)"

The apportionment cases recently decided by the Supreme Court of the United States emphasize the

paramount importance of the citizen's right to vote,[7]

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[7]In Davis v. Mann, —— U.S. ——, 12 L.ed. 2d 609 at pp. 617, 618, 84 S. Ct. —— (1964) concerning areas in the State of Virginia containing "large numbers of military and military-related personnel," the Court said: "Discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible. And state policy, as evidenced by Virginia's election laws, actually favors and fosters voting by military and military-related personnel." Footnote 11 p. 618: "Virginia's election laws enable persons in the armed forces to vote without registration or payment of poll tax. * * *. Although the mere stationing of military personnel in the State does not give them residence, Virginia election officials interpret the applicable statutory provisions to mean that residence for military personnel is determined in the same manner as for all other citizens * * *."

Gray v. Sanders, 372 U.S. 368 at pp. 379, 380, 9 L.ed. 2d 821, 83 S. Ct. 801 (1963): "The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." Quoting Lassiter v. Northampton County Election Board at p. 379, 360 U.S. 45, 3 L.ed. 2d 1072, 79 S. Ct. 985: "A state may if it chooses require voters to pass literacy tests, provided of course that literacy is not used as a cloak to discriminate against one class or group."

Wesberry v. Sanders, 376 U.S. 1 at p. 17, 84 S. Ct. 526, 11 L.ed. 2d 481 (1964): "Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." Concurring opinion: "The equal protection clause of the Fourteenth Amendment forbids * * * discrimination. It does not permit the States to pick out certain qualified citizens or groups of citizens and deny them the right to vote at all."

Reynolds v. Sims, —— U.S. ——, 12 L.ed. 2d 506 at p. 523, 84 S. Ct. 1362 (1964): "History has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely * * * is of the essence of a democratic society and any restrictions on that right strike at the heart of representative government." At page 524: "* * * it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action."

Baker v. Carr, 369 U.S. 186 at p. 244, 7 L.ed. 2d 663, 82

and that court has made it abundantly clear that there may be no discrimination made between individuals.'

Defendants insist that the Constitutional Amendment and the statute involved are in accord with the basic philosophy of this country which subordinates the military to the civilian; that the thinking of military personnel who compose more of a "floating population," would probably differ from that of the civilians in the community; that in some communities in Texas there could be an overwhelming number of military votes compared with the civilian votes if a strong-willed military commander, who was having

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S. Ct. 691 (1962). Justice Douglas in his concurring opinion said: "Within limits (voting) qualifications may be fixed by state law * * *. It is * * * clear that by reason of the commands of the Constitution there are several qualifications that a State may not require * * *. * * * a third barrier to a State's freedom in prescribing qualifications of voters * * * is the equal protection clause of the Fourteenth Amendment * * *. The traditional test under the equal protection clause has been whether a State has made 'an invidious discrimination,' as it does when it selects 'a particular race or nationality for oppressive treatment.'"

See also: Lucas v. Forty-Fourth General Assembly of the State of Colorado, —— U.S. ——, 12 L.ed. 2d 632, 84 S. Ct. 1472 (1964).

'Lassister v. Northampton County Board of Elections, 360 U.S. 45, 51, 79 S. Ct. 985, 3 L.ed. 2d 1072 (1959); Pope v. Williams, 193 U.S. 621, 632, 24 S. Ct. 573, 48 L.ed. 817 (1904).

See also: United States v. Louisiana, 225 F.Supp. 353, 358 (3—Judge E.D. La. 1963), where Circuit Judge Wisdom commented: "There is no license for the loose statement that in our constitutional system the qualification of voters is 'exclusively' committed to the States. * * * More accurately, the States, under Article 1, Section 2 of the Constitution and the Seventeenth Amendment, are free to establish voting qualifications—only if the qualifications do not transgress the United States Constitution. The books are filled with examples of state election laws and practices found to transgress constitutional guaranties. * * *"

trouble with local officials, was tempted "to find the means of persuading or inducing many of the men under his control to go along with a particular idea"; and that the fear of a military take-over, together with the right of government to protect itself against that hazard are sufficient to justify as reasonable the imposition of the total restraint in order to make that impossible.

We believe, however, that present election laws in Texas, separate and apart from those under attack, provide sufficient safeguards to make it highly unlikely that the balance of voting power between the military and civilian in this state will be substantially altered by a removal of the ban against all of those who enter military service from another state. A qualified elector in Texas must be a resident of the state for one year and of the county for six months.[9] More is required of him than mere bodily presence in the state and in the county for the prescribed time. His intention, not necessarily controlled by his subjective statement, but ascertained in the light of all the surrounding circumstances, is also a proper subject for inquiry in determining his residence for voting purposes.[10] In addition, he may be challenged when he purchases his poll tax,[11] and when he presents himself to

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[9]Vernon's Ann. Tex. St. Election Code, Article 5.02.

[10]Vernon's Ann. Tex. St. Election Code, Article 5.08; Mills v. Bartlett, 375 S.W. 2d 940, 943 (Tex. Civ. App. 1964); Farrell v. Jordan, 338 S.W. 2d 269, 274 (Tex. Civ. App. 1960).

[11]"If the county collector has reason to believe that one who applies to pay his poll tax or secure his certificate of exemption from its payment, has falsely stated his age, occupation, precinct of his residence, or length of his residence in the state, county, and city, or any other matter touching his qualifications to vote, he shall require proof of such statement; and, if on inquiry, he is satisfied that said person has

the election judge to vote.[11] Therefore, it does not follow that everyone within the military classification involved will automatically be entitled to vote in Texas. Nor can it be assumed that those who do not want to qualify to vote here would remain silent if an attempt was made to compel them to forfeit the right to vote somewhere else in order to satisfy the whim and caprice of a base commander in Texas who might, contrary to law and military regulations,[12] develop delusions of

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sworn falsely, he shall make a memorandum of the words used in such statement, and present the same to the foreman of the next grand jury or if the County Collector does not personally know one who applies to pay his poll tax or secure his certificate of exemption from its payment as being a resident in the precinct which such person claims as that of his residence, it shall be the duty of such collector to require proof of such residence or of such other facts as may be necessary." Vernon's Ann. Tex. St. Election Code, Article 5.21.

[11]"When a person offering to vote at any general, special, or primary election shall be objected to by an election judge or clerk, a poll watcher, or any other person, the presiding judge shall examine him upon oath touching the points of such objection, and if such person establishes his right to vote to the satisfaction of the presiding judge, he shall be permitted to vote, and the word 'sworn' shall be written upon the poll list opposite the name of the voter. If upon his own oath the person fails to establish his right to vote to the satisfaction of the presiding judge, his vote shall not be accepted unless in addition to his own oath he submits proof by the oath of one well-known resident of the precinct that he is a qualified voter at such election and in such precinct. When such proof is submitted, his vote shall be accepted, and the word 'challenged' and the name and address of the person testifying under oath as to the voter's qualifications shall be written on the poll list opposite the name of the voter." Vernon's Ann. Tex. St. Election Code, Article 8.09.

[12]"* * *, in accordance with Federal law and Armed Forces regulations, no commissioned, warrant, petty, or noncommissioned officer will attempt to influence any person as to his choice of candidate * * *." Voting Information, 1964, Armed Forces Information and Education, Department of Defense, page ix. (Defendant's Exhibit E.)

grandeur. It should also be remembered that each military commander in the field has officers with superior rank over him, all of whom must answer to the President, as Commander-in-Chief, who is a civilian. And even he must answer to the Congress and to the people.

But even if the present laws are not adequate to protect against the hazard of a military take-over at the polls, there is nothing to prevent the state from setting up more stringent conditions under which the right of suffrage may be exercised, so long as they are reasonable and do not discriminate between individuals.[14] The vice in the amendment is that it constitutes a *complete* abrogation of the right of plaintiffs to vote in Texas under *any* circumstances while they are in the military service.

As a practical matter, a great portion of our military personnel are civilians who are serving a period of enlistment before becoming civilians again. Even though they are subject to the orders of their superiors with respect to the installations at which they are stationed, this does not mean that they are under any disability to form an intent to change their legal residence from one place to another. By the same token,

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[14]See Footnote 8, supra.

Texas permits a person serving in the military branch of the United States who was not previously a citizen of the state, and who at the time of filing a petition for divorce has been stationed in a military installation in the state for a continuous period of twelve (12) months next, and in the county where the suit is filed for a continuous period of six (6) months next preceding the filing of same, to be deemed an actual bona fide inhabitant and resident respectively of the state and of the county where such military installation is located, for the purpose of maintaining the suit for divorce. Vernon's Ann. Civ. St. art. 4631.

they do not have to change that residence unless they want to.

The fact that almost every other state permits qualified military personnel to vote[15] indicates that in those states at least, the danger of the military overwhelming the civilans at the ballot box is not considered too great. We know of no community which has requested that its military base be closed, nor have we been advised of anything having taken place in any other state to justify a reasonable fear of military domination in any part of Texas.

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[15] "For voting purposes the legal residence of members of the Armed Forces is generally the state from which they entered military service. This home state remains as the only state in which a person in the Armed Forces has the legal right to vote unless certain conditions are met. Almost all states except Texas will permit persons in the Armed Forces to acquire a new voting residence within their jurisdiction. When this is accomplished, voting rights in the old state of residence are lost." Voting Information, 1964, Armed Forces Information and Education, Department of Defense, page x. (Defendants' Exhibit E.)

It was stipulated that if called as a witness the Voting Officer of the Department of the Air Force would testify: "The State of Texas is the only state in the union which will not permit an otherwise eligible member of the Armed Forces of the United States to acquire legal domicile, for the purpose of voting, upon demonstration of intent to do so, and upon fulfillment of state requirements of residence * * *. Most states will permit a person in the military to acquire a new domicile while in active service. This is accomplished by the military member showing through external evidence that he intends to reside on a permanent basis in the new state. For instance, if a person in the military purchases a home, lives off the military reservation and participates in the civilian activities of the community, most states will permit him to acquire domicile, after he has resided in the new state for the length of time required by law. This time varies from six months to two years. The most common length of time is a one year period."

Plaintiffs have a genuine bona fide desire to live and rear their families in this state. They, and others like them, should be encouraged to purchase their homes, participate in community affairs, and remain in Texas when their military service is completed. But this cannot be done effectively if they are denied the fundamental right to cast their votes in this state. The fact that they may think differently from others in the community constitutes no reason to discriminate against them. Implicit in the concept of full citizenship under the Constitution in our free society is the right to think as one pleases, and then, if he is a qualified elector under reasonable standards imposed by the state, to vote as his conscience dictates. In this connection, it is difficult to reconcile permitting the wife of a serviceman with whom he is living to vote, and at the same time denying that right to him simply because he wears a military uniform. Certainly, neither the degree of her interest in the community, nor her good faith intention to reside there permanently, would ordinarily be any greater than his.

Defendants say that plaintiffs are not typical of persons in the military service. However, plaintiffs and those others who otherwise meet all of the requirements of qualified electors in this state, are the only ones with whom we are dealing. On the other hand, the enlisted man in the barracks, for example, who has done nothing overtly to establish a residence in the community, would, we think, if challenged, be hard put to prove his qualifications to vote, irrespective of whether or not he was acting under orders of his commanding officer.

It is further contended by defendants that when Texas was readmitted to the Union, Congress, by Act approved March 30, 1870 (16 Stat. 80), interpreted the then existing Constitution of Texas, which completely disfranchised residents who were in the military service, as not violating the Fourteenth Amendment. They say that this has great weight and gives rise to the presumption that the interpretation is correct. The same argument, offered in *Reynolds v. Sims*, — U.S. —, 84 S. Ct. 1362, 12 L. ed. 2d 506 (1964), was answered by Chief Justice Warren when he said, in part: "Congress simply lacks the constitutional power to insulate States from attack with respect to alleged deprivations of individual constitutional rights." 12 L. ed. 2d, at 539.

Since we have concluded that Article 6, Section 2 of the Texas Constitution, and Article 5.02, Vernon's Annotated Texas Statutes Election Code, insofar as they wholly deny the right to vote in Texas to plaintiffs and those similarly situated, violate the equal protection clause of the Fourteenth Amendment to the United States Constitution, plaintiffs' petition for injunctive relief restraining and enjoining the defendants from depriving them and anyone else entering military service as a resident citizen of another state who otherwise in good faith meets all of the requirements of a qualified elector in this state, of their right to vote in Texas, is granted.

Judges BROWN and THORNBERRY concur.

Entered at San Antonio, Texas, this 26th day of August, 1964.

ADRIAN A. SPEARS
United States District Judge

APPENDIX II

STATE LAWS INVOLVED IN THE CASE

1. Constitution of Texas, Art. 6, Sec. 2.

Sec. 2. Every person subject to none of the foregoing disqualifications[1] who shall have attained the age of twenty-one (21) years and who shall be a citizen of the United States and who shall have resided in this State one (1) year next preceding an election and the last six (6) months within the district or county in which such person offers to vote, shall be deemed a qualified elector; and provided further, that any voter who is subject to pay a poll tax under the laws of the State of Texas shall have paid said tax before offering to vote at any election in this State and hold a receipt showing that said poll tax was paid before the first day of February next preceding such election. Or if said voter shall have lost or misplaced said tax receipt, he or she, as the case may be, shall be entitled to vote upon making affidavit before any officer authorized to administer oaths that such tax receipt has been lost. Such affidavit shall be made in writing and left with the judge of the election. The husband may pay the poll tax of his wife and receive the receipt therefor. In like manner, the wife may pay the poll tax of her husband and receive the receipt therefor. The Legislature may authorize absentee voting. And this provision of the

[1]Sec. 1 of Art. 6 enumerates the classes of persons who shall not be allowed to vote, as follows: (1) persons under 21 years old; (2) idiots and lunatics; (3) paupers supported by the county; (4) persons convicted of any felony, subject to such exceptions as the Legislature may make.

Constitution shall be self-enacting without the necessity of further legislation. Any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces. [As amended Nov. 2, 1954.]

2. Texas Election Code (Vernon), Art. 5.02.

Art. 5.02. Qualification and requirements for voting

Every person subject to none of the foregoing disqualifications[2] who shall have attained the age of twenty-one years and who shall be a citizen of the United States, and who shall have resided in this state one year next preceding an election, and the last six months within the district or county in which such person offers to vote, shall be deemed a qualified elector, provided that any voter who is subject to pay a poll tax under the laws of this state shall have paid said tax before offering to vote and hold a receipt showing that said poll tax was paid before the first day of February next preceding such election, and any voter who is exempt from paying a poll tax must procure a certificate showing his or her exemption, as required by this Code. If such voter shall have lost or misplaced said tax receipt or certificate of exemption, he or she shall be entitled to vote upon making and leaving with the judge of the election an affidavit that such tax was paid or such certificate was obtained in the manner and during the time allowed by law preceding such election

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[2]See footnote 1.

at which he or she offers to vote, and that such receipt or certificate has been lost, misplaced, or left at home.

Notwithstanding any other provision of this section, any member of the Armed Forces of the United States or component branches thereof who is on active duty in the military service of the United States may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces. This restriction applies only to members of the Armed Forces who are on active duty, and the phrase "time of entering such service" means the time of commencing the current active duty. A re-enlistment after a temporary separation from service upon termination of a prior enlistment shall not be construed to be the commencement of a new period of service, and in such case the county in which the person resided at the time of commencing active service under the prior enlistment shall be construed to be the county of residence at the time of entering service.

The provisions of this section shall apply to all elections, including general, special, and primary elections; provided that a city poll tax shall not be required to vote in any election in this state except in city elections. [As amended Acts 1963, 58th Leg., p. 1017, ch. 424, § 13.]